

Employment Screening Resources

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7/31/2005

Richard Hertling
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Office of Legal Policy
4234 Robert F. Kennedy Building
950 Pennsylvania Ave NW
Washington, DC 20503

RE: OLP Docket No. 100

Dear Mr. Hertling,

I am writing in response to the above referenced Request for Comments. I am an attorney at law and president of a national pre-employment background screening firm, Employment Screening Resources (www.ESRcheck.com). I am also the author of, **“The Safe Hiring Manual--Complete Guide to Keeping Criminals, Imposters and Terrorists Out of Your Workplace.”** (512 pages-Facts on Demand Press) This is the first comprehensive book on employment screening. A copy of the book was sent to your offices on a complimentary basis by the publisher, BRB Publications, in the event it is helpful.

I have also qualified and testified in the Superior Courts of California and Arkansas as an expert witness on issues surrounding safe hiring, due diligence and criminal record checks by employers. I have spoken on these topics at numerous state and national human resources and security conferences around the country. See: http://www.esrcheck.com/ESR_Speaks.php

I was also the chairperson of the steering committee that founded the National Association of Professional Background Screeners (NAPBS) a professional trade organization for the screening industry which has over 300 members. I served as the co-chairman in 2004 and currently serve as past-chair.

I am also a former deputy District Attorney and criminal defense attorney in California and I have taught criminal law and procedure at the University of California Hastings College of the Law. From 1985-2005, I was a certified criminal law specialist in California.

Based upon this background I would like to supplement the information being provided by NAPBS with some additional observations that may be helpful concerning the use of the FBI database for private employers. For purpose of this letter, I use the term “FBI database” as shorthand for the various programs maintained by the government to maintain criminal record histories.

I would like to make the following points regarding the use of the FBI database for private employers:

1. The use of criminal records for employment is heavily regulated by Federal and state laws, and is fundamentally different then the use of criminal records for criminal justice purposes.
2. The FBI database is primarily an arrest database and has limited application to employment inquiries.
3. An FBI database search is not as accurate as a “**real**” criminal search conducted at the courthouse by a Consumer Reporting Agency, which gives up to the minute detail. Database searches are only lead generators or supplemental searches for preemployment background screening purposes.
4. Use of the FBI databases by employers can raise critical issues under the federal Fair Credit Reporting Act (FCRA), particularly concerning accuracy requirements, consumer protection and privacy.
5. Use of the FBI database can subject employers to legal exposure under both federal and state civil rights and anti-discrimination laws concerning both arrest and convictions.
6. Use of the FBI data for many employers is not practical when there is a “hit.”
7. Criminal searches are only one aspect of safe hiring, and use of the FBI database can create a false sense of security
8. Private employers and the public are best served by allowing professional screening firms to have greater access to public data on behalf of employers to be used as a secondary or supplemental tool in conjunction with far more accurate and efficacious county court searches and other safe hiring tools.

The points are explained in more detail below:

- 1. The use of criminal records for employment is heavily regulated by Federal and state law, and is fundamentally different then the use of criminal records for criminal justice purposes.**

The criminal justice databases maintained by the FBI are critical for a number of reasons. They are used for planning, research and information for criminal justice policy. They

are also vital for the daily operation of law enforcement. Police, prosecutors, and courts rely upon that database for the administration of justice.

However, the use of criminal records for **employment** is very different than the use by the criminal justice establishment. For example, for any police officer investigating a crime, a prior arrest can be crucial information regardless of the disposition. However, for employers, an arrest that did not result in a conviction is something that has very limited use under Federal and state anti-discrimination laws. That is because when it comes to the use of such data for employment purposes, there is a large body of statutes and cases that regulates such information, including civil rights and labor laws in the 50 states.

This difference is best illustrated by the situation that would face California employers if they were to utilize the NCIC directly. A California employer could arguably be committing a criminal act and face misdemeanor criminal charges if it utilized the FBI database and discovered that an applicant was arrested in a case that is not either pending or resulted in a conviction, or that the applicant engaged in certain pre-trial or post-trial diversion programs. That is because by statute, California is a “**no-arrest**” state when it comes to employment. According to California Labor code section 432.7:

(a) No employer, whether a public agency or private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program, nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or post trial diversion program. As used in this section, a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.

433. Any person violating this article is guilty of a **misdemeanor**.
(Emphasis added)

Consequently, before any consideration of the use of the FBI database by employers, it must be recognized that the decision is not primarily a criminal justice or security issue, but also involves human resources considerations, labor law and civil rights law that historically have been matters of state determination, as well as Federal law such as the EEOC rules and the FCRA.

2. The FBI database is primarily an arrest database and has limited application to employment inquiries.

It is well documented that the FBI databases is dependent upon the quality, accuracy and timeliness of criminal information reported by states. The facts and statistics set forth in detail by a DOJ study published in August 2003 entitled, "Survey of State Criminal History Information Systems, 2001," demonstrate that criminal reporting from the states to the NCIC is at best a crazy quilt patch work of wildly varying practices. One of the most critical shortcomings is the lack of consistent reporting of dispositions.

A document entitled, "A Review and Evaluation of the National Crime Information Center (NCIC) was prepared by Professor Craig Winston on behalf of NAPBS. A copy is attached to this letter. The paper summarized the issues with the FBI as follow:

Notwithstanding these ongoing efforts, significant problems in the accuracy and validity of the information contained in the state criminal history depositories remain. These problems can be summarized as follows:

- *Many states do not report information concerning dispositions, declinations to prosecute, failure to charge after fingerprints have been submitted, and expungements.*
- *Inconsistency in the various states' reporting requirements and criminal codes impacts the completeness and accuracy of the records*
- *The timeliness of transmission by the local jurisdictions to the state criminal history repositories remains problematic*
- *There are still significant time lags between the time information is transmitted to the state repository and entry into the criminal history records*
- *The process used to linking data to the proper individual and case is still ineffective*
- *Serious problems remain in the process to link dispositional information to the proper case and charge*
- *The format and terminology used by the various states creates problems of interpretation for individuals in other states who are using the information*
- *The use of name checks has been proven create serious identification problem*

- *Differing laws related to dissemination of criminal history records poses significant problems for the implementation of the III program*

It cannot be overemphasized that the deficiencies in state criminal history records present serious problems for the various agencies and organizations who are dependent upon this information. Continued efforts are needed in order to insure that the problems discussed in this report are addressed and the reliability of these records is improved.

Since the FBI database is a much more effective arrest database than a true criminal history database given the inconsistent recording of disposition, it should be recognized from the onset that the FBI database has inherent limitations for employers who in many states are prohibited from the use of arrests only or other resolution of an arrest short of a conviction. (See section 5 below).

3. An FBI database search is not as accurate as a “real” criminal search conducted at the courthouse by a Consumer Reporting Agency, which gives up to the minute detail. Database searches are only lead generators or supplemental searches for preemployment background screening purposes.

The incomplete nature of the FBI database also underscores the fact that the FBI data is capable of producing a false positive or a false negative. This is a critical issue for employers who need criminal history information in order to exercise due diligence. A false negative can occur when there is a defect in the reporting by a state to the NCIC, so that a person with a criminal record is erroneously “cleared” as having no record when in fact they have a criminal conviction.

A false positive occurs when a criminal record comes back as a match, but does not belong to the applicant. Although with the use of fingerprints there probably should be a reduced risk of a false positive, the well publicized case of Scott Lewis in Ohio demonstrates that law enforcement can make clerical errors resulting in false positives. Mr. Lewis was erroneously believe to be a murder suspect based upon a clerical error in entering numbers on an arrest form that mistakenly associated Mr. Lewis’ social security number with a murder suspect. (See the *Safe Hiring Manual*, page 97 for more material or *Lewis vs. Open*, 190 F.Supp. 2d 1049 (S.D. Ohio, 2002))

Since a Consumer Reporting Agency does its research at the actual courthouse or by use of a court database that is the equivalent of going to the courthouse, a search by a private company is clearly the most accurate search. The private company is at the courthouse checking the most up to date records. It is by far a superior search to any database. The primary value of a database is to identify additional courthouses to search. Databases serve as an effective “lead generator” to lead a CRA to additional counties to search at the courthouse level. In other words, databases including the FBI databases is best used as a supplemental secondary tool to tell a CRA where it search, and by no means a substitute for a “real” criminal search at the courthouse.

(Also see below in section 4 on FCRA accuracy requirements for criminal searches placed by law on a Consumer Reporting Agency.).

4. Use of the FBI databases by employers can raise critical issues under the Federal Fair Credit Reporting Act (FCRA), particularly concerning accuracy requirements, consumer protection and privacy.

The use of third party data for employment purpose is covered by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq. When criminal records are accessed by a third party Consumer Reporting Agency (CRA), there are a number of FCRA rules that help ensure fairness, accuracy and privacy. A consumer may not have these protections if all private employers were given direct access to the FBI databases.

There are three FCRA issues that need to be considered:

1. Would the FBI be treated as a Consumer Reporting Agency?
2. If the FBI is not a Consumer Reporting Agency, what will happen to all of the current FCRA protection for the consumer?
3. Even if the FBI is not considered a Consumer Reporting Agency, what roles will states have in regulating how information is used for employment purposes?

First, if a private employer accesses the FBI database directly, it is not entirely clear that the FCRA would have no application. The staff of the Federal Trade Commission has issued an opinion letter that when an employer obtains criminal records from a public agency from which anyone can obtain records, then the public agency is not a Consumer Reporting Agency, and the FCRA does not apply. See: FTC Staff Letter from Clarke W. Brinckerhoff to Ms. Gail Goeke, June 9, 1998.

<http://www.ftc.gov/os/statutes/fcra/goeke.htm>

However, if Congress allows employers to access criminal records directly, then presumably there would be some sort of restriction, so that the general public cannot access the FBI database. If there is some sort of public restriction, under the FCRA (unless amended by Congress), the FBI could be a Consumer Reporting Agency with all of the numerous and complex obligations imposed on a CRA, and must comply with the FCRA.

If the use of FBI data is deemed to fall under the FCRA, then the data is subject to a number of rules. These include accuracy of the data. FCRA sections 607b and 613 concern the processes that a CRA must undergo before allowing the use of information:

(607 b) Accuracy of report. Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

If there is a “hit,” the FCRA contemplates the procedures set forth in section 613 as follows:

§ 613. Public record information for employment purposes [15 U.S.C. § 1681k]
(a) *In general.* A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall (1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

It should be noted that in a number of states, the procedure set forth in 613(a)(1) for simply notifying an applicant is not permitted under state law, necessitating that any “hit” be researched at the courthouse before being utilized in an employment decision.

Other safety measures that consumers currently enjoy under the FCRA include the following rules:

1. **Notice and Certification Rules.** Under section 604, a CRA is required to have an employer certify that proper authorization and disclosure have been obtained, that the employers will not use the information in violation of any state or Federal anti-discrimination law and that applicant will receive a notice of pre-adverse action.
2. **A CRA must follow reasonable procedures concerning identity and proper use of information per FCRA 607(a).** Per the requirements of the FCRA, every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 (relating to what may be reported) and to limit the furnishing of consumer reports to the purposes listed under section 604. These procedures require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency is required to make a reasonable effort to verify the identity of a new prospective user and for the uses certified by a prospective user prior to furnishing the user a consumer report. No consumer reporting agency may furnish a consumer report to any entity if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604. Lesson—A CRA must know the client and the limitations on what can be reported.
3. **CRA must take measures to ensure accuracy of report (FCRA 607(b)).** Whenever a consumer reporting agency prepares a consumer report, it shall follow reasonable procedures to assure

maximum possible accuracy of the information concerning the individual about whom the report relates. Lesson—The CRA must have written procedures that are followed and enforced to ensure maximum accuracy.

4. **CRA must provide the Employer with the FTC prepared summary, “Notice to Users of Consumer Reports: Obligations of Users under the FCRA.”** (See FCRA Sec. 607(d).) (A copy is in the Appendix.)
5. **CRA must provide Employer with FTC summary, “Summary of Your Rights,” with every report.** (See FCRA 604(b)(1)(B).) (A copy is in the Appendix.)
6. **A CRA may only include certain items of information in a consumer report.** FCRA Section 605 specifically limits certain information. Due to the 1998 amendments to the FCRA, this section now only refers to a seven-year limitation on arrests and not criminal convictions. There are no limits under the Federal FCRA for reporting criminal convictions although there are some state limits. However, the FCRA, however, provides that these exceptions do not apply to an individual whose annual salary is reasonably expected to equal \$75,000 a year or more.
7. **Re-investigation rule.** When a CRA prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished. (See Section 614.) (This only applies to matters that are adverse on its face. Employment or education verification is not adverse on its face, even if it becomes adverse in the context of the application, such as the information shows an applicant lied about job history.)
8. **Disclosure rules.** A CRA must disclose to a consumer what is in the consumer's file upon request, identify sources, identify everyone who procured a report for employment for the past two years, and comply with various rules (e.g. provide trained personnel who can explain to a consumer any information in the report). (See Sections 609 and 610.)
9. **Duty to investigate.** If applicant contests what is in the report, the CRA has an obligation to investigate and determine accuracy within 30 days, and to take appropriate actions. The CRA must give notice to furnisher within 5 days. Various other duties are dependent upon results of re-investigation. (See Sections 611 and 612.) CRA must carefully follow a series of rules in terms of various notices and responses and have a FCRA Compliance procedure in place.

If Congress determines that the FBI database is to be made available to private employers and the FCRA does not apply to the FBI, Congress must still consider all of the above rights, remedies and protections the consumer currently enjoy under the FCRA. For example, question 5(D) in the Request for Comments refers to an appeals mechanism. Under the current FCRA, when a CRA does the criminal search, there is already an extensive mechanism to guarantee consent, permissible use of data, accuracy, appeal rights and re-investigation. These concerns are already taken care of by private industry.

Even assuming that Congress amends the FCRA rules in terms of their application to the FBI, there are still state employment and procedures laws to consider. California for

example is one of a number of states that has its own version of the FCRA. Partly as a response to the Scot Lewis situation previously mentioned, California passed Civil Code section 1786.50 that applies FCRA type rules to private employer who access public records directly without the use of a screening firm. If employers are able to obtain criminal record directly, it is possible that other states may respond by enacting rules similar to California rules to extend to private employers FCRA type rules to ensure accuracy and fairness in the use of FBI criminal records. Protecting job applicants and employees is a traditional state function.

5. Use of the FBI database can subject employers to legal exposure under both Federal and state civil rights and anti-discrimination laws concerning both arrests and convections.

Both the EEOC and various state civil rights act limit the use of criminal data for employment purposes. The principals are discussed in length in the “Safe Hiring Manual.”

A number of states have some sort of prohibition against the use of arrest records for employment decisions. See for example: California, Hawaii, Illinois, Massachusetts, Michigan, Nevada, New York, Pennsylvania, Rhode Island, Utah, Virginia, Washington, and Wisconsin

The Federal EEOC has also taken the position that the use of arrests records is subject to limitation. An arrest is typically only the opinion of a police officer without any underlying fact finding process. See: EEOC Notice N-915-061 (9/7/90). In-depth procedures must be utilized before utilizing arrest records.

In addition, criminal convictions are also subject to EEOC rules. According to EEOC rules, (See EEOC notice N-915 (2/4/87) there must be a business justification to utilize a criminal record based upon a set of criteria outlined by the EEOC. An employer may not automatically reject an applicant because of criminal record.

One of the many roles played by private background screening firms is that such firms assist employers in making appropriate decisions. Mass access by private employers to raw criminal records without the use of Consumer Reporting Agencies as a buffer can lead to numerous problems related to Federal and state discrimination laws.

6. Use of the FBI data for many employers is not practical when there is a “hit.”

Another issue for employees is using ad understand the raw data when information is returned. Where an FBI report come back “clear,” then the employer has nothing further to do. Of course, if there is a false negative, then the employer faces a risk in the future because they are operating under a false sense of security that the applicant has no criminal records.

However, where there is a “hit,” then the employer may be in a difficult position. Typically, FBI “rap sheets” are not designed for ease of reading for individuals outside of the criminal justice system. An employer with no legal training or law enforcement background may have some difficulty in understanding and interpreting the record. In addition, the employers may experience difficulty in determining if the entries are arrests only, or if they resulted in a disposition.

As a result, if there is a hit, it will normally require an employer to seek professional assistance to obtain the detail and the current status of the FBI report, and to evaluate its usefulness and legality for employment decisions.

7. Criminal searches are only one aspect of safe hiring, and use of the FBI database can create a false sense of security.

Another issue for employers is that a criminal record check, although critical, is only one aspect of safe hiring. As outlined in, “The Safe Hiring Manual,” other essential elements of safe hiring includes the application, interview and past employment check procedures. In order to demonstrate due diligence, an employer needs to verify credentials, identity and other aspects of an applicant’s qualifications such as driving records.

In addition because of the likelihood of false negatives as discussed above, employers who really entirely upon an FBI database checks can find that they have a false sense of security

8. Private employers and the public are best served by allowing professional screening firms to have greater access to public data to be used as a secondary or supplemental tool in conjunction with far more accurate and efficacious county court searches and other safe hiring tools.

The needs for private employer to exercise due diligence in hiring have been meet by the professional background screening industry for a number of years. Because CRA’s check criminal records at the courthouse, private employers enjoy the most accurate criminal data available. Due to the availability of private databases, private employers also have a broader reach in discovering other jurisdictions to check. By use of professional background firms that operate under the FCRA, employers and applicants have a great deal of privacy, since the FCRA is the acknowledged gold standard of consumer privacy protection.

To ensure maxim protection, without setting up new, expensive and massive governmental bureaucracy, the most effective solution is to utilize the service of private sector background screening firms that has performed the job efficiently and effectively

for years, and to allow the background screening firms greater access to the FBI databases on behalf of employers. Such a plan keeps in force and affect all of the historic protections that applicants and employers both enjoy and maintains the highest level of protection for America.

Thank you for your consideration of these comments.

Lester S. Rosen
President
Employment Screening Resources

The National Crime Information Center
A Review and Evaluation
August 3, 2005

Statement of Purpose

This report was prepared on behalf of the National Association of Professional Background Screeners (NAPBS) by Craig N. Winston, under the direction of Lester S. Rosen and Mike Sankey, both members of the Board of Directors of NAPBS. Its stated purpose was to review the National Crime Information Center and the Interstate Identification System in order to evaluate its effectiveness in maintaining accurate and complete criminal history records.

About the Author

Craig N. Winston is an Assistant Professor of Criminal Justice at Sonoma State University, Rohnert Park, California. He received his Juris Doctor from the University of Akron, Akron, Ohio and his Master of Criminal Justice from the University of North Florida located in Jacksonville, Florida. He also completing post-graduate work at the University of Cincinnati, Cincinnati, Ohio in criminology, research methods and statistics.

His research interests include constitutional law and civil liberties, criminal law and procedure, and community policing. His work has been published in *Police Quarterly* and the *Journal of Crime and Justice*.

INTRODUCTION

The availability of accurate and up-to-date criminal history records is vital to the criminal justice system. The use of this information is also relative for agencies and organizations outside the criminal justice system. Employers such as banks and securities organizations have statutory authority to obtain criminal history information and rely upon it in making their hiring decisions.

Notwithstanding the increased importance and reliance upon criminal history records, a recent report by the Bureau of Justice Statistics (2001) pointed out that many experts suggest that the “accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation’s criminal history record information systems.”

The report that follows presents a brief overview of the history and development of criminal history records in the United States. The various state and Federal databases are discussed. The accuracy and completeness of the information as well as other attendant problems are then addressed. Finally, current programs established to monitor and improve criminal history records are reviewed and summary of the findings of the study are presented.

HISTORY AND DEVELOPMENT OF CRIMINAL HISTORY RECORDS

In 1908, the U.S. Department of Justice established the Identification Bureau to develop and maintain a fingerprint-based criminal history information system. This system was expanded in 1924, when the FBI, the successor to the Identification Bureau,

was directed by the U.S. Congress to develop an “Identification Division” to maintain manual criminal history records and use fingerprint information for criminal identification and related purposes. Despite these efforts, the Wickersham report, published in 1931, determined that the system was inadequate and recommended that the government undertake major revisions.

A concentrated and organized effort to make improvements in the information compiled by the Identification Bureau did not begin until the 1967 President’s Commission on Law Enforcement and Administration of Justice published a report evaluating the Nation’s criminal justice system. Crime, the Commission reported, was a serious problem in the United States and the criminal justice system was not equipped to deal with the current crime problem. The Commission called for the establishment of a national criminal history system.

In response to Commission recommendations, the U.S. Department of Justice Law Enforcement Assistance Administration (LEAA) created Project Search. This program was a consortium of states charged with the responsibility of developing a “computerized system for the interstate exchange of criminal history record information” (Use and Management of Criminal Justice Record Information, 2001, 26).

In 1972, LEAA established the Comprehensive Data Systems (CDS) program to encourage states to establish criminal justice information systems. These efforts resulted in the development of the Computerized Criminal History (CCH) component of CDS. CCH contains criminal histories for both Federal and state offenders. By 1976, 26 states joined CCH and began creating criminal history repositories.

Currently, all states maintain some form of criminal history records. A recent study by the Bureau of Justice Statistics indicated that the criminal history records for over 59 million offenders were stored in these repositories. As a general rule, these records contain information including the name of the individual, demographic information such as sex and race, physical characteristics, and driver's license or auto registration information. In addition, the charges and a full set of fingerprints for felonies and serious misdemeanors are maintained. This information is sent to the state repository by reporting jurisdictions.

Similar to state efforts, new developments were also taking place at the Federal level. In 1967, the National Crime Information Center (NCIC) was developed to replace the manual criminal history files maintained by the Identification Division with a computerized criminal history records system. NCIC contained information on stolen vehicles, missing persons, guns, and license plates. A complete listing of the NCIC records can be found in Appendix A. As aforementioned, in the early 1970s, the information available through NCIC was expanded through the creation of the CCH to include criminal history records of persons arrested for Federal and state crimes.

The FBI also maintains the Interstate Identification Index system (III). III does not contain criminal history records, but provides an automated index of names and other identifiers of individuals whose criminal history records are in computerized files. If an authorized agency wishes to learn if an individual has a criminal record, they can query III through NCIC. If the results of the query indicate that the individual has a criminal record (a "hit"), then a second inquiry through NCIC and the National Law Enforcement Telecommunications System can be made to obtain the criminal history. As of 2001, III

contained 52.3 million criminal history files. These files represent 174 million arrest cycles (i.e., some criminal history files contain information related to multiple arrests).

In July of 1999, the FBI implemented NCIC 2000. This revision expanded the type of information available through NCIC (see Appendices B and C). Another aspect of NCIC 2000 was the decentralization of criminal history records. Under NCIC, state records were maintained in both the state and the Federal criminal history repositories. In order to avoid duplication of records, states who participate in the III under NCIC 2000 assume full responsibility for providing criminal history records. If an inquiry results in a hit, III directs the inquiry to the state criminal history record repository, which sends the pertinent information to the agency requesting the information. As of 2004, 47 states were participating in III system. [This figure represents](#) an increase of four states since 2000.

The FBI and state repositories also contain “master name indexes” (MNI). An agency wishing to check a criminal history can query the system by using the individual’s name or other identifiers such as sex, race, date of birth, height, weight, and/or hair color. If the query indicates that the individual has a record, the agency can request the individual’s complete criminal history.

Notwithstanding the increased participation in III, access to state criminal history records, a key component to the success of NCIC 2000, continues to be a problem.

A recent report by the Bureau of Justice Statistics indicated that as of 2001, 22 reporting jurisdictions indicated that at least 75% of their criminal history records were accessible through III; 15 reported that 50 – 75% of their records were accessible; and 14 indicated that less than 50% of their records were III accessible.

One additional point bears review. Automation is an integral part of the effectiveness of III. While significant strides have been made in this regard, as of 2001 only 30 states had at least 90% of their records automated (27 of these states indicated that their criminal history records were fully automated). Six states reported that less than 70% of their criminal history records were automated.

As pointed out previously, the accuracy of state and Federal criminal history databases is vital to law enforcements agencies, courts and other components of the criminal justice system, and select industries that have access to this information. The importance of valid records was emphasized by Richard Thornburgh, former U.S. Attorney General when he stated in the *Use and Management of Criminal History Record Information, 2001*, “[There is a] ‘straight-line relationship’ between high-quality criminal history information and the effectiveness of the Nation’s criminal justice system.” Despite the obvious importance of precise data, there are serious deficiencies in the information contained in state and therefore Federal criminal history records. These concerns include accuracy and completeness, timeliness, method of inquiry, and linking/tracking capabilities.

It is also imperative to emphasize that the validity of criminal history records concerning state crime, and therefore the information available through NCIC, is totally dependent upon the reporting policies and practices of the various states. It is this area that the majority of problems arise.

EVALUATION OF DATA QUALITY

Content

The content of state repositories is governed by state law and is dependent upon the reporting practices of the state. State laws do vary in relation to the reporting requirements. While the laws in all states and the District of Columbia require that arrest and charge information be reported to their state criminal history repository, research indicates that problems with accuracy and completeness of this information, as well as the timeliness of transmission to the state repositories persist.

In order for a criminal history record to be complete it should include the following:

1. arrest and charge information
2. identifying information including fingerprints
3. prosecutor declinations
4. final dispositions (including dismissal and reduction in charge)
5. admission/release of felons and perpetrators of serious crimes
6. probation and parole information
7. modification of felony conviction

Though, as pointed out above, all states report arrest and charge information, there is some variation in the reporting laws concerning issues such as disposition, declination to prosecute, and failure to charge after fingerprints and case information have been forwarded to the state repository. Thirty-five states require that dispositions be forwarded to the state repository, but of the 174 million arrest cycles on file only 45% have dispositions. In 47 states, information concerning declination to prosecute is sent to

the state repository. [As of 2001](#), [however](#), only 5 states reported that all prosecutorial declinations were transmitted to their respective repositories. In addition, only 31 states require updated information to be sent to the state's repository if a person is not charged after the individual has been arrested and their fingerprints have been submitted.

Reporting requirements related to expungements, pardons, restoration of rights, and other issues also vary from state to state. These variations have a significant impact on the quality of data available.

A second issue related to accuracy and content is the lack of uniformity in the criminal codes of the various states. As a general rule, the types of activities that are prohibited are consistent throughout the states. There are, however, some inconsistencies that could influence the validity of the criminal history records due to differences in classifications of behaviors. These records contain information related to serious misdemeanors and felonies. Whether a state defines a particular act as a misdemeanor or a felony may impact the reliability of the criminal history records.

Theft provides a good illustration of this problem. One of the criteria, which is used to distinguish between a misdemeanor theft and a felony theft is the value of the item(s) stolen. This amount differs greatly from state to state. In Florida, the theft of an item worth more than \$300.00 is a felony. In California, the threshold amount for a felony theft is \$400.00; while in Ohio and Maryland \$500.00 delineates the difference between a misdemeanor and a felony.

Crimes related to controlled substances present a similar problem. In Wyoming, possession of more than 85 grams of marijuana is a felony, while the same act in Texas, Ohio, New York, or California would be a misdemeanor. Sale of any amount of

marijuana is a felony in California and Texas, but the sale of up to 25 grams in New York or 20 grams in Ohio would be a misdemeanor. These and similar discrepancies can impact which crimes are reported to the state repository and therefore the accuracy of the information that is available through the state and Federal criminal record history systems.

Timeliness

The timeliness of transmission of data relevant to a criminal case is a significant issue and clearly impacts the validity of the information. Table 1 summarizes the major findings of a recent Bureau of Justice report (2005) concerning the timeliness of the data contained in state criminal history records.

TABLE 1. Average Number of Days for Repositories to Receive and Process Criminal History Data.

ACTIVITY	DAYS
Arrest information	24
Court disposition	46
Prison admission	31

Source: *Improving Access to and Integrity of Criminal History Records, 2005*

The utility of a criminal history record is dramatically affected by the lack of up-to-date information. This fact was emphasized by an administrator in a correctional facility in a Mid-Western state. When discussing the importance of accurate criminal history records, he stated that the biggest problem he experienced was the fact that dispositions were not generally available. He went on to point out that this presented problems when hiring new employees or evaluating rehabilitation efforts. In addition to the problem of timely transmission of dispositions, linking the disposition to the proper file is also a major concern. This issue will be explored in more detail in the next section.

Linking Case Histories and Individuals

One of the most serious data quality issues is linking the data to the proper individual and case. When an individual is arrested for the first time, he or she is assigned a unique number. This number should allow accurate storage and retrieval of criminal records associated with this individual. Unfortunately, due to the use of aliases, false identifiers, and clerical errors, duplicate records can be created. These problems are generally remedied when fingerprints are used to process subsequent cases, but discrepancies may still be present. A more serious problem arises when attempts are made to integrate correctional dispositions with information related to the arrest and charge. This situation is exacerbated when the individual has more than one pending case or the disposition information does not match the charge data due to plea bargaining agreements or reduction in charges.

Many states have successfully overcome the problem of linking information related to the charge and disposition by implementing a “case tracking” system that integrates the individual’s name with a case identification number. [According to a recent report published by the Bureau of Justice Statistics, however,](#) there are still significant problems linking dispositions with the appropriate case. In 2001, 14 states estimated that over 700,000 of their final court dispositions could not be linked to arrest or charging files. This represents an average of over 50,000 per state. Sixteen additional states estimated the percentage of dispositions that could not be linked to the appropriate case.

Table 2 [sets forth this information.](#)

TABLE 2. Percentage of Dispositions Not Linked to Charge or Arrest Information

Number of States	% of Dispositions
2	50%
3	30 – 40%
2	25%
9	10%

Source: Improving Access to and Integrity of Criminal History Records, 2005

In addition, problems persist when attempting to integrate arrest information with disposition when the case has been modified by factors such as plea-bargaining or other modifications of the charge reported at the time of arrest. The use of a charge-tracking system has been able to reduce the problem, but efforts to [improve its implementation](#) are still underway.

Format and Terminology

Two additional concerns have been raised [related to](#) the quality of the data contained in criminal history records. First, the formats that are used by the various states are not consistent. [These inconsistencies](#) can create a situation where some records may contain blank data fields or fields that simply contain the word “unknown.” Differences in terminology can create difficulties for individuals attempting to interpret the data. The implementation of the III program in 1999 has increased the magnitude of these problems. Prior to 1999, the FBI provided the information requested in national searches. Problems in interpretation were eliminated since the FBI incorporated state information into a standard format. [Despite the fact that](#) the new system relies upon the states to provide criminal history records, some states are not formatting their information according to FBI standards. This problem and others have created the need for reforms in the content and format of criminal history records.

False Positives/Negative

Clearly, the lack of consistency in the data reported and the timeliness of reporting and entering the data are significant problems. Another problem is presented when the inquiry is based upon the individual's name and other personal identifiers other than fingerprints. These types of inquiries are typically done by noncriminal justice organizations including Federal and state agencies that have been authorized by law to obtain criminal history records.

To illustrate, the records maintained in the III index are those of individuals who have been arrested or formally charged with a serious misdemeanor or felony. A name search should result in a "hit" if the individual's name is found in the index due to some previous involvement with the criminal justice system. Studies have indicated, however, that name searches can result in two types of errors. The first, a "false positive," occurs when the search indicates that the individual's name is in the MNI and therefore has a criminal record when, in fact, he or she does not. The other possible error is a "false negative" or an indication that the individual does not have a criminal record when in fact he or she does.

In order to obtain a clear picture of the accuracy of name searches, a task force was formed during the late 1990s consisting of the Bureau of Justice Statistics, the Florida Department of Law Enforcement, the Department of Housing and Urban Development, and the FBI. The purpose of this task force was to compare the accuracy of identifications made using name checks through III and those using a fingerprint-based search of the FBI's records. The task force analyzed the results of 93,274 background checks from Florida licensing or employment applicants, 323 public housing applicants,

and 2550 volunteers. The results indicated that when compared to fingerprint-verified criminal histories, name-checks yielded 11.7% false negatives and 5.5% false positives. In other words, of the 10,673 subjects who were found to have a criminal record by fingerprint-verified search, the name check search indicated that 1,252 did not have records (false positives). Similarly, of the 82,610 individuals who were determined not to have a criminal record by the fingerprint-verified search, the results of the name check indicated that 4,562 had criminal records (false negatives).

Based upon the findings of this study, the 6.9 million fingerprint-verified background checks conducted by the FBI in 1997 would have resulted in 346,000 false positives and 70,200 false negatives if a name check verification had been used.

It becomes apparent that name checks alone would result in large numbers of persons being improperly disqualified for employment. In addition, persons who may pose some risk because of their criminal record are not discovered.

In order to deal with this problem, NCIC 2000 contains an “enhanced name search” database. For example, a search under the name of “James” will also return records on a “Jim”, or “Jimmy”. Notwithstanding this improvement, cases where the individual is using an alias or a false identity remain problematic. One of the reasons cited for the continued use of name checks is the time it takes to process fingerprint identification. The implementation of the Integrated Automated Fingerprint Identification System (IAFIS) in 1999 addressed this problem and can provide responses to fingerprint identification requests within 24 hours.

The use of fingerprints, though more accurate, does have privacy and logistic problems associated with it. The III index and the Integrated Automated Fingerprint

Identification System (IAFIS) contain information on individuals who have been arrested. In order for a fingerprint search to return accurate results, the individual's prints must be on file.

THE NATIONAL CRIME PREVENTION AND PRIVACY COMPACT

The recent move to NCIC 2000 signaled a change in the way in which criminal history records are maintained and utilized. When it is fully implemented, each state will be responsible for providing criminal history records through III. State laws regarding the dissemination of these records create problems in this regard. Though all states provide access to the criminal history records for criminal justice agencies, the laws of many states do not authorize access to these records by noncriminal justice agencies and organizations. In order to deal with this problem, the U.S. Congress passed Senate Bill 2002 that established the National Crime Prevention and Privacy Compact. The stated purpose of the Compact is "to facilitate authorized interstate criminal history record exchanges for noncriminal justice purposes" (Section 212, paragraph 4). The states are also required to review each request and response and delete any information that may not be released according to state law. It is interesting to note that as of 2003, 44 states were participating in the Interstate Identification Index Program, but only 16 were members of the National Crime Prevention and Privacy Compact (See Appendix D). Until all states take part in the Compact, access to criminal history records will not be consistent throughout the country.

CONCLUSION

The purpose of this report was to provide summary information concerning the NCIC and to examine the quality of the state data accessible through NCIC. In order to accomplish this, a brief history of the development of criminal history records was presented as well as a discussion of the current criminal history and related databases maintained by the states and the Federal government.

Since the establishment of the first nationwide criminal history repositories, there have been numerous revisions in an effort to upgrade the accuracy of the information contained therein. Today, the FBI and [all 50](#) states maintain criminal history repositories to aid the criminal justice system and select noncriminal justice agencies and organizations. Recently, changes such as the revision to the NCIC and III have been made to improve the content and accessibility of the information. In 1995, the National Criminal History Improvement Program (NCHIP) was established. This program provides grants to states to work on the improvement of NCIC and increase participation in the III program. This program has been successful in many regards. The number of automated records increased 35% from 1995 to 2001. The number of states participating in the III program increased from 26 in 1993 to 47 in 2004. In addition, under NCHIP, participating states have been able to improve their information pertaining to domestic violence and sex offender registries and take advantage of the latest technology.

[Despite](#) these ongoing efforts, significant problems in the accuracy and validity of the information contained in the state criminal history depositories remain. These problems can be summarized as follows:

- Many states do not report information concerning dispositions, declinations to prosecute, failure to charge after fingerprints have been submitted, and expungements.
- Inconsistency in the various states' reporting requirements and criminal codes impacts the completeness and accuracy of the records.
- The timeliness of transmission by the local jurisdictions to the state criminal history repositories remains problematic.
- There are still significant time lags between the time information is transmitted to the state repository and entry into the criminal history records.
- The process used to linking data to the proper individual and case is still ineffective.
- Serious problems remain in the process to link dispositional information to the proper case and charge.
- The format and terminology used by the various states creates problems of interpretation for individuals in other states who are using the information.
- The use of name checks has been proven create serious identification problem.
- Differing laws related to dissemination of criminal history records pose significant problems for the implementation of the III program.

It cannot be overemphasized that the deficiencies in state criminal history records present serious problems for the various agencies and organizations [that](#) are dependent upon the information they provide. Continued efforts are needed in order to insure that the problems discussed in this report are addressed and the reliability of these records improved.

Sources Consulted

- Criminal Justice Information Services (CJIS) Division(2003). *National Crime Information Center*. Web site: www.fas.org/irp/agency/doj/fbi/is/ncic.
- Criminal Justice Information Services (CJIS) Division(2003). *National Crime History Improvement Program*. Web site: www.fas.org/irp/agency/doj/fbi/is/ncic.
- Date, Shruti. (2005). FBI network prevails over early glitches. Retrieved from, http://appserv.gen.com/state/vol_5no10/news/482-1.html
- FBI National Press Release. (July 15, 1999) Retrieved from, www.fbi.gov/pressrel/pressrel99/ncic2000.htm.
- Federal Bureau of Investigation. National Crime Information Center (1993) *a snapshot of the future*. Web site: www.fbi.gov
- Giles, Frederick G. (2002). The Myths and Realities of On-line Criminal History Databases. Retrieved from <http://www.ci-wackenhut.com>
- Hinton, Derek. ((2004). *The Criminal Records Manual*. Tempe, AZ: Facts on Demand Press
- Illinois Criminal Justice Information Authority. (2003) *Sharing criminal history record information: the Interstate Identification Index*. Web site: www.Icjla.org.
- Illinois Criminal Justice Information Authority. (2003) *Results of the 2003 Criminal History Record Information Audit*. Web site: www.Icjla.org.
- Loesch, David R. (May 18, 2000). *Statement for the Record of David R. Loesch... on Crime Regarding HR 3410 and Name Check Efficacy* Retrieved from www.fbi.gov/congress/congress/loesch062100.htm<http://lcweb2.loc.gov/mster/minerva/107/senate/www>.
- Loesch, David R. (June 21, 2000). *Statement of David R. Loesch...Before the Committee on the Judiciary*. Retrieved from, http://judiciary.senate.gov/oldsite/6212000_drl.htm
- McCue, C., Stone, E.S., and Gooch, T.P. (November 2003). Data Mining and Value-Added Analysis.” *FBI Law Enforcement Bulletin*, 1 – 6.
- Rosen, Lester S. (2005). *The Safe Hiring Manual*. Tempe, Arizona: Facts on Demand Press
- Sprecher, Milford H. (1995) States Gearing up for NCIC 2000. Retrieved from, www.govtech.nte/magazine/gt/1995/jan/ncic.php

- Tillett, Scott L. (1999). FBI turns on new crime-fighting system. Retrieved from, www.fcw.com/fcw/articles/1999/fcw_7151999_fbi.asp
- U.S. Department of Justice. Office of Justice Programs. (2005) *Improving Access to and Integrity of Criminal History Records*. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Federal Bureau of Investigation. (2004). *Interstate Identification Index (III) National Fingerprint File (NFF) Program*. Washington DC: Government Printing Office.
- U.S. Department of Justice. Bureau of Justice Statistics. (2002) *Linking Uniform Crime Reporting Data to Other Datasets*. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Bureau of Justice Statistics. (2001). Increasing the Utility of Criminal History Record: Report of the National Task Force. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Federal Bureau of Investigation. Criminal Justice Information Services. (2001) *Interstate Identification Index Status Report*. Washington, DC: U.S. Government Printing Office.
- U.S. Department of Justice. Federal Bureau of Investigation. Criminal Justice Information Services. (2001). *The Investigative Tool*. Washington, DC: U.S. Government Printing Office.
- U.S. Department of Justice. Federal Bureau of Investigation. Criminal Justice Information Services. (2001). *Areas of Liability for the Criminal Justice System Administrator*. Washington, DC: U.S. Government Printing Office.
- U.S. Department of Justice. Bureau of Justice Statistics. (2001). *Survey of State Criminal History Information Systems 2001*. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Bureau of Justice Statistics. (2001). *Use and Management of Criminal Justice Record Information: A Comprehensive Report, 2001 Update*. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Bureau of Justice Statistics. (2000). Continuing Criminal History Records Improvement Evaluation, Final 1994 – 98 Report . Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Federal Bureau of Investigation. (2000). *National Crime Information Center (NCIC) NCIC File Reference Card*. Washington DC: Government Printing Office

- U.S. Department of Justice. Federal Bureau of Investigation. (2000). NCIC: An Overview. Washington DC: U.S. Government Printing Office.
- U.S. Department of Justice. Bureau of Justice Statistics. (1999). Interstate Identification Index. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Bureau of Justice Statistics. (1999). Interstate Identification Index Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General. Washington, D.C. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Bureau of Justice Statistics. (1997). *Implementing the National Incident-Based Reporting System: A Project Status Report*. Web site: www.usdoj.gov/bjs/pub
- U.S. Department of Justice. Bureau of Justice Statistics. *Integrated Automated Fingerprint Identification System or IAFIS. What is it?* Web site: www.fbi.gov.
- U.S. Department of Justice. Bureau of Justice Statistics. *National Conference on Criminal History Records: Brady and Beyond*. Web site: www.usdoj.gov/bjs/pub
- Woodmacy, Donald A. (1989) *National Crime Information Center. Law Enforcement System is Getting a Major Face-lift*. Government Technology Magazine.

APPENDIX A
NCIC Databases

Stolen Articles
Foreign Fugitives
Stolen Guns
Criminal History Queries
Stolen License Plates
Deported Felons
Missing Persons
Criminal Justice Agency Identifier
Stolen Securities
Stolen Boats
Gang and terrorist members
Unidentified Persons
United States Secret Service Protection File
Stolen Vehicles
Persons Subject to Protective Orders
Wanted Persons
Canadian Police Information Center

APPENDIX B
NCIC 2000 Databases

Stolen Articles
Foreign Fugitives
Stolen Guns
Criminal History Queries
Stolen License Plates
Deported Felons
Missing Persons
Criminal Justice Agency Identifier
Stolen Securities
Stolen Boats
Gang and terrorist members
Unidentified Persons
United States Secret Service Protection File
Stolen Vehicles
Persons Subject to Protective Orders
Wanted Persons
Canadian Police Information Center
Enhanced Name Search
Search of right index finger prints
Mugshots
Other identifying images such as scars, tattoos
Sexual Offenders
Persons on Probation or Parole
Persons incarcerated in Federal prisons
User manuals
Information linking
Improved data quality
On-line as hoc searches
Maintaining five days of system inquires to allow agencies to be notified if they are looking for information on the same case

APPENDIX C
Information on File in NCIC
([Federal Bureau of Investigation](#), 2005)

Criminal History Files: 52.3 million criminal history records
(containing 174 arrest cycles)

Convicted Sex Offender Registry File: 395,250

Gang and Terrorist Members: 165,200

National Protection Order Files: 924,000

Wanted Persons/Wants and Warrants: 1,195,000
(not including juveniles, Canadian
warrants, foreign fugitives)

APPENDIX D
Compact States
2003

Alaska
Arizona
Arkansas
Colorado
Connecticut
Florida
Georgia
Iowa
Kansas
Maine
Minnesota
Montana
Nevada
New Jersey
Oklahoma
South Carolina